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Refer To File #: 300062-0001

VIA E-MAIL & U.S. MAIL

September 5, 2008

U.S. Bureau of Reclamation  
Quality of Information, 84-21300  
P.O. Box 25007  
Denver, CO 80225-0007

BRDRODINFOQUALITY@usbr.gov

Re: Complaint About Information Quality

Dear Sir or Madam:

On behalf of the Coalition for a Sustainable Delta (Coalition), I am hereby submitting a Request for Information Correction (RFIC) for expedited review under the Information Quality Act (IQA), Section 515 of Public Law 106-554, 44 U.S.C. § 3516, note, the information quality guidelines issued by the Office of Management and Budget, 67 Fed. Reg. 8452 (Feb. 22, 2002) (OMB Guidelines), and the procedures set forth in Bureau of Reclamation Information Quality Guidelines.

The Coalition seeks the correction of influential scientific information disseminated by the Bureau of Reclamation (BOR) in the *Central Valley Project and State Water Project Operations Criteria and Plan Biological Assessment* (BA), issued on May 16, 2008. The BA relies on an untested hypothesis advanced by Dr. William A. Bennett and references that hypothesis repeatedly. It does so despite the fact that – as a Freedom of Information Act request submitted to BOR has revealed – BOR has no records that explain, support, or otherwise reference the hypothesis. Dissemination of this influential scientific information could affect vital public policy decisions being made by governmental agencies and harm tens of millions of Californians by limiting their water supply on the basis of conjecture.

We request expedited review and correction of the BA – as opposed to processing under the BOR guidelines within 60 days of receipt – in light of the facts that (1) the BA is a highly influential document that is presently under review by the U.S. Fish and Wildlife Service (FWS) and (2) FWS must issue a biological opinion not later than December 15, 2008. *See Natural Resources Defense Council v. Norton*, No. 05-1207 (E.D. Cal. Aug. 29, 2008) (setting a deadline of Dec. 15, 2008 for FWS to complete the biological opinion). FWS is relying upon the BA as it prepares its biological opinion so that timely correction is essential. Additionally, the biological



opinion itself is highly influential because it establishes certain parameters within which the Central Valley Project and State Water Project must operate.

## **I. FACTUAL BACKGROUND**

### **A. The Central Valley Project and the State Water Project**

The Central Valley Project (CVP) and the State Water Project (SWP) are two major inter-basin water storage and delivery systems within California. BOR and the California Department of Water Resources (DWR) operate the CVP and SWP, respectively. The CVP and SWP divert water from the southern portion of the Sacramento-San Joaquin Delta (Delta) and transport water via natural watercourses and canal systems to areas south and west of the Delta. About two-thirds of all Californians and millions of acres of irrigated farmland rely on the Delta for water from the CVP and SWP.

The Delta also provides habitat for a number of native species that are listed as threatened or endangered under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, including the delta smelt. The delta smelt is a small translucent fish with a narrow geographic range limited to low salinity and freshwater habitats of the Delta. The Fish and Wildlife Service (FWS) listed the delta smelt as a threatened species on March 5, 1993. 58 Fed. Reg. 12,854 (March 5, 1993). FWS designated critical habitat for the delta smelt on December 19, 1994. 59 Fed. Reg. 65,256 (Dec. 19, 1994). On July 10, 2008, FWS initiated a status review to determine if reclassifying the delta smelt as endangered is warranted. 73 Fed. Reg. 39,639 (July 10, 2008).

Operation of the CVP and SWP affects listed fish species in the Delta.

### **B. Users of the Delta - the Coalition for a Sustainable Delta**

The Coalition is comprised of agricultural water users and individuals in the San Joaquin Valley. The Coalition and its members depend on water from the Delta; the water is essential to their livelihood and economic well-being. In addition to their economic interest in the Delta, the Coalition and its members are dedicated to protecting the Delta and committed to promoting a strategy to ensure its sustainability. The purpose of the Coalition is to advance the interests of its members, namely, to (1) better the conditions of those engaged in agricultural pursuits in the San Joaquin Valley and (2) ensure a sustainable and reliable water supply by protecting the Delta and promoting a strategy to ensure its sustainability.

### **C. The Biological Assessment and the Bennett Hypothesis**

BOR and DWR propose to continue to operate the CVP and SWP and to conduct certain future actions. In order to continue to operate the CVP and SWP, BOR is required under section 7(a)(2) of the ESA to consult with FWS and the National Marine Fisheries Service (NMFS) regarding the effects of operating the CVP and SWP on federally listed species. 16 U.S.C. § 1536(a)(2). Under the regulations that govern consultation, BOR must prepare a biological assessment. 50 C.F.R. § 402.14(b). The purpose of the biological assessment is to evaluate the



potential effects of the action on listed species and designated critical habitat. *Id.* § 402.14(b). The biological assessment is the starting point for FWS and NMFS when those agencies, in turn, prepare a biological opinion. As part of the consultation, FWS and NMFS are obligated to consider the effects of the CVP and SWP together with the environmental baseline when determining whether the CVP and SWP jeopardize one or more listed species or destroy or adversely modify designated critical habitat of such species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

On May 16, 2008, BOR issued the BA. The BA discusses and analyzes whether the continued operation of the CVP and SWP is likely to adversely affect listed species or designated habitat. In its discussion regarding the delta smelt and the effects of the CVP and SWP on the delta smelt, the BA relies on and repeatedly references an untested hypothesis advanced by Dr. William A. Bennett.<sup>1</sup> This hypothesis (the Bennett Hypothesis) posits that delta smelt that hatch early during the spawning season grow larger than those that hatch later in the season, and that those larger females are more likely to produce greater numbers of offspring. But because the CVP and the SWP pump water out of the south Delta during these early spawning months, the Bennett Hypothesis proposes that a disproportionate number of the larger, more-fecund female delta smelt are entrained and killed, thereby creating an artificial selection regime that favors the survival of smaller, less-fecund females. Apparently, according to Bennett, selection for these reproductively inferior individuals could serve to reduce the mean annual output of smelt offspring, and thereby contribute to the decline of the species. The BA cites this untested proposition as unpublished. *E.g.*, BA at 7-26.

The BA relies upon this information not only in its discussion of the delta smelt, but also in its analysis of the effects of the CVP and SWP on the species.

#### **D. Freedom of Information Act Request**

On May 17, 2008, in an effort to ascertain the basis for the Bennett Hypothesis as expressed in the BA, we submitted a request under the Freedom of Information Act (FOIA) to BOR for all records related to the Bennett Hypothesis. *See* Exhibit 1. We also requested all records of communication between Dr. Bennett and any other party after January 1, 2007.

Under FOIA, federal agencies including BOR are required to respond to a request for records within 20 business days, excluding Saturdays, Sundays, and legal holidays. 5 U.S.C. § 552(a)(6)(A)(i). BOR did not do so in this instance, which is a violation of law. *See Or. Natural Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (an untimely response is a violation of FOIA); *Gilmore v. United States Dept. of Energy*, 33 F. Supp. 2d 1184, 1188 (N.D. Cal. 1998) (same). Specifically, BOR did not provide its first interim response, which consisted of a single e-mail, until more than 45 business days after the date of the FOIA

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<sup>1</sup> In light of the paucity of information available regarding this hypothesis, we are unable to evaluate it. For this reason, we do not address the substantive merit of the hypothesis except to note that, based on the record before BOR, the hypothesis is mere conjecture.



request. Nevertheless, we allowed the agency substantial additional time, beyond that specified by statute, to conduct a complete review of its files and respond to the request.

In responses dated July 23, 2008 and August 8, 2008, BOR indicated that the agency does not have any records related to the Bennett unpublished analysis or the data upon which any analysis was based. *See* Exhibits 2 & 3. Specifically, BOR stated “Reclamation does not have any records regarding the citations [to the Bennett Hypothesis] on pages 7-26, 13-5, 13-6, and 17-13.” Exhibit 3 at 1. BOR went on to state that “[n]o responsive records are withheld.” *Id.* Thus, the only responsive record in BOR’s possession is an email dated January 29, 2008. This email also includes an attachment that has an excerpt of text partially describing the Bennett Hypothesis. BOR has no other data, statistical information, studies, or evidence related to the Bennett Hypothesis.

In its FOIA response, BOR indicates that it drafted those portions of the BA that reference “Bennett (unpublished)” on the basis of “pre-publication presentations ... by Dr. Bennett.” Exhibit 3 at 1. BOR goes on to state that “[w]e do not have in our possession any manuscript representing the work.” *Id.* Evidently, BOR also has no record summarizing or evaluating the work, or even any notes or other records that paraphrase, summarize, or otherwise describe Dr. Bennett’s presentations.

## **II. INFORMATION QUALITY STANDARDS**

Congress enacted the IQA in December 2000, requiring that information disseminated by the government meet quality standards. The purpose of the IQA is to ensure that government information is objective, supported by scientifically sound data, and that the public has meaningful access to the data and methodological information needed to test and reproduce the government’s results. *See* 67 Fed. Reg. at 8455-57. A key principle of the IQA is that the quality of scientific information disseminated by the government is directly related to the information’s objectivity and reproducibility. 67 Fed. Reg. at 8459. The IQA requires the Office of Management and Budget (OMB) to issue guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.” Pub. L. No. 106-554 § 515 Appendix C, 114 Stat. 2763A-153 (2000).

On February 22, 2002, OMB issued its final guidelines requiring each federal agency subject to the Paperwork Reduction Act to issue its own information quality guidelines and to establish administrative mechanisms to allow affected persons to seek and obtain correction of information disseminated by the agency that does not comply with OMB or agency guidelines. 67 Fed. Reg. at 8458. Pursuant to the OMB guidelines, BOR issued guidelines that largely incorporate the OMB Guidelines and standards.

The OMB Guidelines apply to “information” that is “disseminated” by agencies subject to the Paperwork Reduction Act. “Information” is broadly defined and includes “any communication or representation of knowledge such as facts or data, in any medium or form,



including textual, numerical, graphic, cartographic, narrative, or audiovisual forms.” 67 Fed. Reg. at 8460. “Dissemination” of information means “agency initiated or sponsored distribution of information to the public.” *Id.* This includes:

information that the agency disseminates, . . . if an agency, as an institution, disseminated information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to [the OMB] guidelines.

67 Fed. Reg. at 8454.

The BA is subject to the OMB Guidelines as information disseminated by the Bureau of Reclamation.

**A. The BA is Influential Scientific Information**

Influential scientific information is held to higher quality standards than other forms of information. 67 Fed. Reg. at 8460. Such information must include a high degree of transparency about data and methods in order to facilitate the reproducibility of the information by qualified third parties. *Id.* Information is considered “influential” in this context if the agency can “reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions.” *Id.*

BOR guidelines hold influential information to the same higher standard. Influential information “is subject to a high degree of transparency about data and methods to facilitate the reproducibility of such information by other qualified scientists.” Bureau of Reclamation, Information Quality Guidelines, available at [www.usbr.gov/main/qoi/guidelines.html](http://www.usbr.gov/main/qoi/guidelines.html). The information should be transparent regarding the following four factors: the source of data used, the various assumptions employed, the methods applied, and the statistical procedures employed. *See id.*

The BA constitutes influential scientific information. The BA is a document that must be prepared by BOR pursuant to the joint consultation regulations, 50 C.F.R. § 402.14(b), and that informs FWS and NMFS as they make a determination whether the activities described in the BA jeopardize one or more listed species or destroy or adversely modify designated critical habitat of such species. Further, FWS will base its biological opinion in large part on the information and analysis contained in the BA. Therefore, the information contained in the BA has a substantial impact on the management decisions made by Executive Branch officials that affect the 25 million Californians that obtain their water from the Delta. As discussed above, this has an impact not only on the members of the Coalition who along with other farmers depend upon water from the Delta to support approximately 3 million acres of prime agricultural farmland, but also upon tens of millions of residents of central and southern California.



## **B. BOR Failed to Adhere to the Quality of Information Requirements**

The purpose of the OMB Guidelines is to preserve the quality of information federal agencies disseminate. Quality is evaluated in terms of the objectivity, integrity, and utility of the information. 67 Fed. Reg. at 8459.

### **(i) The Information Fails to Meet the Objectivity Standard**

Objectivity involves two elements, presentation and substance. With respect to presentation, the issue is whether the information is being presented in an “accurate, clear, complete, and unbiased manner.” 67 Fed. Reg. at 8459. An agency must identify the sources of the disseminated information, and when involving scientific or statistical information, the supporting data and models must be disclosed so that the public can assess whether there may be any reason to question the objectivity of the sources. *Id.* Reference to the Bennett Hypothesis in the BA does not satisfy the objectivity standard with respect to presentation because the information is not presented in an accurate and unbiased manner. The BA simply recites the Bennett Hypothesis without citing to any supporting data or models. This is unsurprising given that, in response to the May 17, 2008 FOIA request, BOR indicated it has “no records” relating to the Bennett Hypothesis. Exhibit 3 at 1. Supporting data or models cannot be disclosed by BOR because the agency has no record of the scientific information (that is, the Bennett Hypothesis) or any such data or models.<sup>2</sup>

Additionally, though reference to the Bennett Hypothesis in the BA is neither accurate nor unbiased, BOR has tacitly accepted this untested hypothesis as fact and drawn conclusions regarding the effects of CVP and SWP operations on the delta smelt based upon the hypothesis. For example, in the effects analysis, the BA states “[s]pecifically, losses of more fecund, early spawning large females and their offspring could eliminate a portion of the cohort most likely to survive to reproductive age, and possibly more likely to be fecund. Winter exports may also have an effect on the number of adult which survive a second year, a possible important factor affecting delta smelt population resilience.” BA at 13-5.

With respect to substance, the objectivity standard focuses on “ensuring accurate, reliable, and unbiased information.” In a scientific context, the original and supporting data must be generated and the analytic results must be developed using sound statistical and research methods. *Id.* Agency guidelines must require “sufficient transparency about data and methods that an independent reanalysis could be undertaken by a qualified member of the public.” 67 Fed. Reg. at 8460. Especially with regard to influential scientific information, there should be a high degree of transparency about data and methods to facilitate the reproducibility of such information by qualified third parties. *Id.* Reproducibility requires that information is capable of

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<sup>2</sup> At times in the BA, it appears BOR is – either intentionally or unintentionally – attempting to gloss over the dearth of information within its possession. For example, at pages 7-26 and 17-13 of the BA, BOR references “Bennett (unpublished data)” though the agency does not have the data referenced and it is unclear that any such data exists.



being substantially reproduced, meaning that “independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error.” *Id.*

As described in the BA, the Bennett Hypothesis does not satisfy the substance element of the objectivity standard because it is neither accurate nor reliable. BOR does not have any record of any supporting data for the hypothesis, and, therefore, there is insufficient transparency foreclosing an independent reanalysis of the data. For this reason, the Bennett Hypothesis is not reproducible except insofar as it posits a relationship between various phenomenon without reference to any supporting data. As mentioned above, a FOIA request for the underlying data or other supporting information for the Bennett Hypothesis led to the revelation that BOR does not have any data or other evidence related to the Bennett Hypothesis. Thus, based on the records in BOR’s possession, the Bennett Hypothesis cannot be substantiated or reproduced because the original and/or supporting data is unavailable or does not exist. It follows from the fact that no record of the Bennett Hypothesis exists within BOR’s records that BOR included the Bennett Hypothesis without examining whether the hypothesis had merit or was supported by empirical evidence. Based upon the absence of information describing or supporting the hypothesis in BOR’s own records, the information presented in the BA is nothing more than conjecture. By including the Bennett Hypothesis in the BA, and by drawing conclusions based on such inaccurate information, BOR has failed to satisfy the objectivity standard. BOR’s failure to meet this standard is compounded by the fact that the BA constitutes influential scientific information.

**(ii) The Information Fails to Meet the Utility Standard**

The utility standard “refers to the usefulness of the information to its intended users.” 67 Fed. Reg. at 8459. Usefulness is considered not only from the perspective of the agency, but also from the perspective of the public. Therefore, “when transparency is relevant for assessing the usefulness from the public’s perspective, the agency must take care to ensure that transparency has been addressed in its review of the information.” 67 Fed. Reg. at 8459. In other words, to the extent that transparency will facilitate an assessment of the usefulness of the information by the public, the agency must ensure such transparency.

BOR has not met the utility standard because it has disseminated information that has no basis in fact. The Bennett Hypothesis and the conclusions drawn from it are not useful to BOR, FWS, or the public in analyzing the effects of the CVP or SWP on the delta smelt because they are completely unsubstantiated by any data, statistical information, or other study in the possession of BOR. BOR has acknowledged that it does not have any records relating to the hypothesis in its files. Further, based on BOR’s response to the FOIA request, it appears BOR included the Bennett Hypothesis in the BA without reviewing any written documentation describing the hypothesis or steps taken (if any) to test it.

Additionally, inclusion of the Bennett Hypothesis with references to “unpublished analysis” and “unpublished data” misleads FWS and the public by giving the impression that BOR has such analysis and data. Because BOR does not have such analysis and data, the agency



cannot have conducted any evaluation of the basic level of quality of such analysis and data. This contravenes the notion of transparency because it forecloses FWS and the public from assessing the usefulness of the Bennett Hypothesis.

### **III. THE COALITION IS ADVERSELY AFFECTED**

The Coalition will be directly and substantially harmed if the requested corrections are not granted. Water from the Delta is essential to the livelihood and economic well-being of the Coalition's members. Without sufficient water resources, its members cannot sustain their crops. The inclusion of the Bennett Hypothesis in the BA may ultimately cause FWS to impose measures that both fail to improve upon the current circumstances and limit the amount of water distributed to the Coalition and other water users.

BOR relies upon the Bennett Hypothesis to draw conclusions regarding the effects of the continued operation of the CVP and SWP on the delta smelt. The BA's inclusion of the Bennett Hypothesis in the effects section suggests that BOR relies on the hypothesis in drawing certain conclusions about the CVP and SWP – namely, that increased pumping during the winter and early spring months will adversely affect the delta smelt and contribute to a decline in the species. Such conclusions will ultimately inform the FWS in drafting its Biological Opinion and will impact the policies regarding the operations of the CVP and SWP and the amount of water that is pumped from the Delta and diverted for the use of the Coalition's members to irrigate their fields.

### **IV. RELIEF REQUESTED**

Conclusions regarding the effect of the CVP and SWP on delta smelt are based on incomplete and unreliable information that does not meet the standards of the IQA and the BOR's Guidelines. Because the information is flawed, it should not be used by governmental agencies that must make vital public policy decisions that affect the economy of the entire State of California and influence the ultimate availability of water to tens of millions of Californians.

The Coalition requests the correction of the following disseminated, influential information for failure to meet the IQA quality requirements.

1. **Statement:** "It has been proposed that losses of larger females and their larvae may have a disproportionate effect on the delta smelt population (B. Bennett, unpublished data). Bennett (unpublished data) proposes that larger females spawn earlier in the season and produce more eggs, which are of better quality, and survivability, as has been noted for Atlantic cod and other commercially harvested species (Marteinsdottir and Steinarsson 1998; Swain et al. 2007). As a consequence, winter and early spring exports, which have continually increased as described above (Figure 7-14), could have an important effect on reproductive success of early spawning female delta smelt. Bennett hypothesizes that the observed reduction in the mean size of adult delta smelt in the early 1990s (Sweetnam 1999) is a result of selective losses of earlier spawning adults and their larvae, thereby selecting for later spawned offspring (that have less





time to reach maturity). Under this hypothesis, the most important result of the loss of early spawning females would manifest itself in the year following the loss, and would therefore not necessarily be detected by analyses relating fall abundance indices to same-year (or same-water year) predictors. This hypothesis is presently being evaluated by Bennett's laboratory using otolith methods." BA at 7-26, 17-13.

**Requested Correction:** Delete

2. **Statement:** "During some of the recent POD years, increased water project exports during winter resulted in higher losses of adult smelt (Chapter 7), particularly early spawning fish (and their offspring) that may be proportionally more important to the population." BA at 13-2.

**Requested Correction:** Delete

3. **Statement:** "There is a clear coincidence between higher entrainment and population decline in the short period from 2000 (and especially 2002) onward, a period for which there are even now few data with which to fit elaborate statistical models. Moreover, it has been proposed that entrainment losses may manifest effects in the following water year. For example, Bennett (unpublished) has hypothesized that losses of larger females may have a disproportionate effect on the delta smelt population. Specifically, losses of more fecund, early spawning large females and their offspring could eliminate a portion of the cohort most likely to survive to reproductive age, and possibly more likely to be fecund." BA at 13-5.

**Requested Correction:** Delete

4. **Statement:** Bennett (unpublished analysis) proposes that reduced spring exports resulting from VAMP has selectively enhanced the survival of delta smelt larvae that emerge during VAMP by reducing direct entrainment. Initial otolith studies by Bennett's lab suggest that these spring-spawned fish dominate subsequent recruitment to adult life stages; by contrast, delta smelt spawned prior to the VAMP have been poorly-represented in the adult stock in recent years. He further proposes that the differential fate of winter and spring cohorts may affect sizes of delta smelt in fall because the spring cohorts have a shorter growing season. These results suggest that direct entrainment of larvae and juvenile delta smelt during the spring may be a significant issue in some years." BA at 13-6.

**Requested Correction:** Delete

In addition to the statements listed above, any additional conclusions or statements that rely in whole or in part upon the Bennett Hypothesis should be deleted from the BA.



**V. CONCLUSION**

We respectfully request that BOR take immediate action to delete the above-identified portions of the BA, as well as any additional sections of the BA that rely upon the disputed information.

Very truly yours,

Paul S. Weiland  
of Nossaman LLP

cc: Director Jim Nussle, Office of Management and Budget via U.S. mail  
Chairman James Connaughton, Council on Environmental Quality via U.S. mail  
Secretary Dirk Kempthorne, Department of the Interior via U.S. mail  
Commissioner Robert Johnson, U.S. Bureau of Reclamation via U.S. mail  
Regional Director Donald Glaser, U.S. Bureau of Reclamation via U.S. mail  
Director Dale Hall, U.S. Fish and Wildlife Service via U.S. mail

AMH/  
Enclosures

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REFER TO FILE #  
300115 - 0001

May 17, 2008

**VIA FACSIMILE & E-MAIL**

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Bureau of Reclamation FOIA Officer  
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E-mail: borfoia@usbr.gov

Kathleen Christian  
Mid-Pacific Region FOIA Officer  
Bureau of Reclamation  
2800 Cottage Way, MP-3700  
Sacramento CA 95825-1898  
Fax: (916) 978-5186

Re: Freedom of Information Act Request

Dear Sir or Madam:

This is a request for federal government records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and the Department of the Interior FOIA Regulations, 43 C.F.R. pt. 2.

Please provide us with the following:

(1) records referenced in Central Valley Project and State Water Project Operations Criteria and Plan Biological Assessment dated May 16, 2008, as set forth below:

- records referenced on page 7-2 as "B. Bennett, unpublished";
- records referenced on page 7-8 as "Bennett unpublished";
- records referenced on page 7-9 as "Bennett (unpublished)";
- records referenced on page 7-26 as "B. Bennett, unpublished data" and "Bennett (unpublished data)";
- records referenced on page 13-5 as "Bennett (unpublished)" and "Bennett (unpublished data)";
- records referenced on page 13-6 as "Bennett (unpublished analysis)"; and

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LOS ANGELES    SAN FRANCISCO    ORANGE COUNTY    SACRAMENTO    WASHINGTON, D.C./VIRGINIA    AUSTIN    SEATTLE

**EXHIBIT** 1

FOIA Officer

May 17, 2008

Page 2

- records referenced on page 17-13 as "B. Bennett, unpublished data" and "Bennett (unpublished data)".

(2) all records of communication between Dr. William A. Bennett and any other party dated after January 1, 2007 along with any attachments thereto, including but not limited to communication between Dr. Bennett and U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, National Marine Fisheries Service, CALFED, and California Department of Fish and Game personnel.

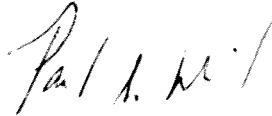
The term records as used herein should be construed broadly consistent with the Department of the Interior FOIA regulations. 43 C.F.R. § 2.3(c).

We are willing to pay up to \$250.00 in fees associated with this request. In the event that you anticipate that the fees associated with responding to this request will exceed \$250.00, please contact us in order that we can ensure that you understand the scope of the request. When responding, please specify the request above (i.e., either request no. 1 or 2) to which the record being disclosed is responsive. In the event any records are withheld, please provide a description of such records along with the basis for withholding the records.

Under FOIA, you are required to respond to a request for records within 20 business days, excluding Saturdays, Sundays, and legal holidays. 5 U.S.C. § 552(a)(6)(A)(i). We expect that you will comply with this statutory requirement. Failure to do so is a violation of law. *See Or. Natural Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (an untimely response is a violation of FOIA); *Gilmore v. United States Dept. of Energy*, 33 F. Supp. 2d 1184, 1188 (N.D. Cal. 1998) (same).

Please do not hesitate to contact us with inquiries regarding this request.

Very truly yours,



Paul S. Weiland  
of NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

PSW/lhh



# United States Department of the Interior

BUREAU OF RECLAMATION  
Mid-Pacific Regional Office  
2800 Cottage Way  
Sacramento, California 95825-1898

IN REPLY  
REFER TO:  
MP-3700  
RIM-6.10

JUL 23 2008

RECEIVED  
JUL 23 2008  
BUREAU OF RECLAMATION  
SACRAMENTO, CALIF.

VIA FEDERAL EXPRESS

Mr. Paul S. Weiland  
Nossaman, Guthner, Knox & Elliott, LLP  
18101 Von Karman Avenue, Suite 1800  
Irvine, CA 92612-0177

Subject: Freedom of Information Act (FOIA) Request – BOR-2008-00175

Dear Mr. Weiland:

This letter is in response to your May 17, 2008, FOIA request in which you seek two categories of records. You addressed your request to the Bureau of Reclamation's Denver, Colorado office and Mid-Pacific Region office. In a June 9, 2008, telephone conversation with Kathleen Christian, Mid-Pacific Regional FOIA Officer, you clarified that you were seeking records located within the Mid-Pacific Region. With this letter we provide a partial response to your request.

In your item (1), you seek records referenced as "Bennett, unpublished" at various pages of the May 16, 2008, *Central Valley Project and State Water Project Operations Criteria and Plan Biological Assessment*. We reviewed the pages you reference in your FOIA request.

The record referenced on pages 7-2, 7-8 and 7-9 should have been cited as "Bennett 2005." We apologize for the error. The text of the Biological Assessment is being updated. A copy of Bennett 2005 is available to the public through the University of California eScholarship® Repository, at the following internet address:  
<http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1029&context=jmie/sfews>.

In item (2) of your request, you seek "all records of communication between Dr. William A. Bennett and any other party dated after January 1, 2007 along with any attachments thereto...." We have located one responsive record, a January 29, 2008, e-mail message. A copy is enclosed.

We thank you for your patience with the time it has taken to process your request. We anticipate providing a final response to your request by July 30, 2008.

EXHIBIT 2

Subject: Freedom of Information Act Request - BOR-2008-00175

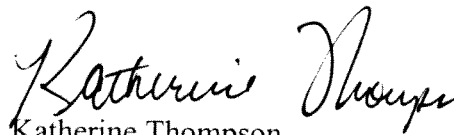
2

If you consider this to be a denial of your request under 43 CFR 2.28(a), you may file an appeal by writing to: Department of the Interior, Office of the Solicitor, Attn: FOIA Appeals Office, 1849 C Street NW., Mail Stop 6556, Washington, D.C. 20240.

Your appeal must be in writing and received no later than 30 workdays after the date of this letter or 30 workdays after the records have been made available. The appeal should be marked "FREEDOM OF INFORMATION APPEAL" on both the envelope and the face of the letter. Include a copy of correspondence between you and Reclamation, including your original request and this letter. You also should explain in as much detail as possible the reasons you believe our response to be in error, and, include a contact name and daytime telephone number.

If you have any questions about this response, please contact Kathleen Christian, Regional FOIA Officer, at 916-978-5554 or [kcchristian@mp.usbr.gov](mailto:kcchristian@mp.usbr.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Katherine Thompson". The signature is fluid and cursive, with the first name "Katherine" written in a larger, more prominent script than the last name "Thompson".

Katherine Thompson  
Assistant Regional Director for  
Support Services

Enclosure

Fw Response to Mike C. on Draft Threats Narrative for Delta Smelt.eml.txt  
Subject:  
Fw: Response to Mike C. on Draft Threats Narrative for Delta Smelt  
From:  
Victoria\_Poage@fws.gov  
Date:  
Thu, 3 Jul 2008 10:25:00 -0700  
To:  
Mike Chotkowski <chotski@pacbell.net>

Mike,

As per your request, I'm forwarding the only e-mail correspondence that I have from Bill Bennett re: DNFRT from the December-January period.

----- Forwarded by Victoria Poage/SAC/R1/FWS/DOI on 07/03/2008 10:23 AM  
-----

"Bill Bennett"  
<wabennett@ucdavis.edu>

Sent by:  
billbennett22@gmail.com

01/29/2008 11:30  
PM

"BJ Miller"  
<bj\_miller@sbcglobal.net>

To

CC

"Poage Victoria"  
<Victoria\_Poage@fws.gov>,  
"Chotkowski Mike"  
<chotski@pacbell.net>, "Gingras  
Marty" <mgingras@dfg.ca.gov>,  
"Kimmerer Wim" <kimmerer@sfsu.edu>,  
"McDonnell Barbara"  
<bmcdonne@water.ca.gov>, "Rosekrans  
Spreck" <spreck@edf.org>, "Rhoads  
Peter" <prhoads@mindspring.com>,  
"Julio Adib-Samii"  
<JADIBSAMII@dfg.ca.gov>, "Randy  
Baxter" <rbaxter@dfg.ca.gov>,  
"Moyle Peter"  
<pmmoyle@ucdavis.edu>,  
alubaswilliams@mp.usbr.gov, "Feyrer  
Fred" <ffeyrer@water.ca.gov>,  
"Hanson Chuck" <CHansonEnv@aol.com>  
Subject  
Re: Response to Mike C. on Draft  
Threats Narrative for Delta Smelt

Hi Victoria and Mike,

Here are my comments and other bits. I agree with Wim and BJ that this initial draft was well done and thorough. You are welcome to take or leave any of my comments. I still have some lingering thoughts about synthesis that will be better communicated after more thought.

Best wishes,

Bill Fw Response to Mike C. on Draft Threats Narrative for Delta Smelt.eml.txt

On Jan 29, 2008 3:36 PM, BJ Miller <bj\_miller@sbcglobal.net> wrote:  
Victoria,

I am attaching my comments on the threats assessment. I have a number of them, but they do not detract from my appreciation for Mike's undertaking this difficult and thankless task and providing such a good start for us.

I wrote my comments in the draft text. Only a few of them are actual edits. The rest are just comments.

BJ

(See attached file: Bennett-Comments on Draft threats.doc)



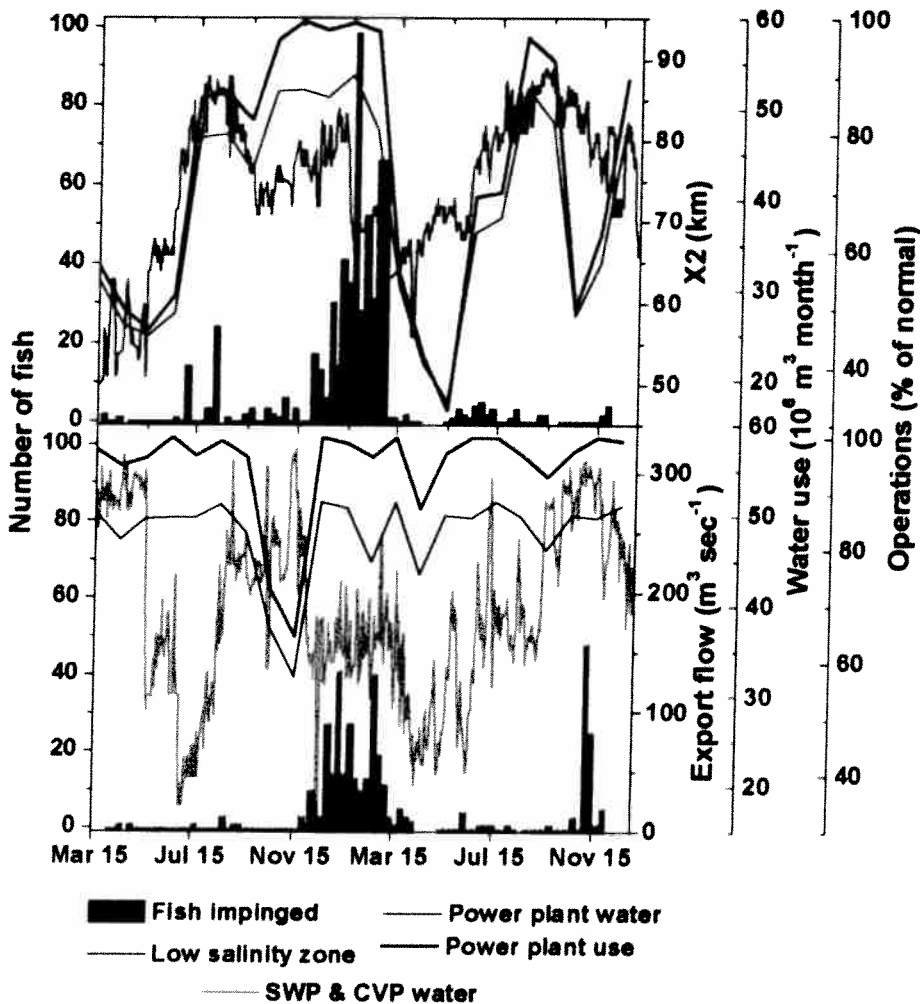
Comments on "Delta smelt threats" draft Jan 03, 2008.  
Bill Bennett  
Jan 29, 2008

### **1. Predation**

The potential for predation to influence delta smelt abundance has risen substantially with the abundances of exotic fishes over the last decade. Inland silversides, in particular, have steadily increased in the regular beach seine surveys for juvenile salmon conducted by the USFWS since the late 1970s, suggesting these fish have effectively colonized the shoal habitats of the Delta, Suisun Bay, and Suisun Marsh. Silversides are known to forage at relatively high levels, and readily consume fish larvae (Bennett and Moyle 1996, Bennett 2005). Because inland silversides frequent the microhabitats (e.g. sandy beaches) where delta smelt presumably spawn, the probability of smelt larvae hatching and co-occurring with schools of foraging silversides has increased. Although episodic predation by silversides has not been observed directly it has the potential to effectively reduce larval abundance.

NBA: Randy Brown initially hoped to have pre- and post-project monitoring for fish larvae (i.e. striped bass). I recall there may have been some sampling by DFG in 1987, but I was then given the chore from 1988-1991. Randy was worried that DFG wouldn't follow-through so in typical fashion he agreed to fund my larval starvation work, if I also monitored the NBA. So, I established the 4 stations (used till 2004) and sampled every 4-5 days (~March-June) using a DFG egg/larval net & sled from my 14 ft skiff. Anyway, the 3<sup>rd</sup> chapter of my dissertation describes the results couched in a BACI design (Bennett 1993). While overall catch of larval smelt was low then as well, the sampled volumes are small compared to the volume of Lindsey or even Barker Sloughs, and the pump has the ability to export the equivalent of Barker Slough each day. I also caught the first ripe delta smelt P. Moyle or I had ever seen in Barker in 1991. Overall, the low catch may actually indicate the potential importance of this area to larval smelt; i.e. presence vs. absence may be a more relevant metric here.

Power plants: In some of my old striped bass reports I found an assessment of entrainment by Ecological Analysis (1981). It's a tome with lots of interesting stuff and data! Here is a graph showing impingement of delta smelt (~ >25mm) from 1978-1979. Besides clearly showing the plants can affect smelt, it appears they also document the winter migration; smelt impingement increases in mid December in conjunction with a sharp 10km shift in X2 down-estuary. Also, impingement appears higher at Pittsburg then Antioch. I don't have data on this, but I recall the POD management team had good reasons to believe both facilities have ramped-down considerably in recent years, being used infrequently during peak use periods in July, and were also relied on during the power-crisis in 2000. Currently, given that use is confined to July, I would judge the power plants have little or no effect on smelt, because water temperatures are regularly >20 °C, few if any smelt are caught on that side of the Bay in the Tow-Net Survey, and those fish that are caught in that area appear in poor condition (my data; also Hobbs et al. 2007). Clearly, the power plants could have important effects if run at the 1978-1979 levels and at different times of the year, especially early spring and winter.



**SWP/CVP & harvest selection:** My hypothesis has higher relevance to early spawned larvae than to adults. This is because there is no evidence that size-distributions of salvaged fish are skewed to the right (i.e. more larger fish, Grimaldo et al. manuscript). Thus while winter salvage is mortality, it isn't necessarily selective on larger mature females (or males): a key component of what Kenny Rose coined as "The Big Mama" hypothesis.

2<sup>nd</sup> to last paragraph, 1<sup>st</sup> sentence: ... to disproportionately affect individuals undertaking particular life history strategies or at a single life stage of delta smelt.

2<sup>nd</sup> to last sentence: Under this hypothesis, a multigenerational loss of early spawned larvae may reflect strong directional selection against traits carried by the most robust individuals, eventually rendering the population more vulnerable to adverse conditions and year-class failures.

Last paragraph: Clearly, there is evidence for effects at all life stages, except for eggs. As Wim would probably agree, even his percentage losses of 20mm fish leave one wondering whether (or under what circumstances) it matters or not for the population.

**Food limitation:** Nixon (1988) identified a correlation between primary production levels and fish yield (as a proxy for the top trophic level). Overall, a considerable body of subsequent work has struggled with reliably measuring the intervening linkages between the bottom and top of estuarine food webs; in almost every case the signal gets lost between pods and fish. That said, I'm not sure I buy the argument that low primary production is the cause of "low and declining pelagic fishes..."

Instead of "residual" fish growth, use "growth from SJ to SB was lower than the overall mean growth".

In general I think the food limitation mechanism is slightly overstated, and portrayed in a "this or that" sort of way (although, you do qualify this a bit later), which isn't how it would play out. At next EET meeting I'll show data on how interactions with other environmental parameters inflate evidence for apparent food limitation.

I just read Wim's comments, and would refine his sentence about "little work has been done on food limitation with fish." (Hey Wim, spoken like a true "pod-guy") My dissertation work on striped bass is a fairly extensive search for food-limitation: 4 years of data and over 1,000 specimens (Bennett et al. 1995). Perhaps because examining food limitation for fish is a larger spatial and temporal scale process, it doesn't seem like much has been done; i.e. 4 years is a lot for a study, but only 4 points really addressing the question. Anyway, no big deal...

To me, the co-occurrence relationships reflect larger-scale processes than food limitation (similar to what you have here) thus something like habitat loss, which impairs fish and pods similarly.

**Toxics:** Actually, it was my presentations prior to finishing my paper (Bennett et al. 1995) that got the rice-growers nervous; it had the first field-evidence over the larval population/stage. Use it if you want, but there are several reasons why I don't buy Howard's work at all; for one, the statistical analysis is wrong and has interpretive issues similar to the co-occurrence work.

**Genetics/Allee effects:** I don't have Peter's paper handy, but suspect he was speculating based on first-principles of conservation biology. Fortunately, the appropriate studies have been at least partially funded by the USFWS, but to address this specific issue funding will need to be extended to a time series of samples such as my collection and those in a freezer at DFG.

I agree with Wim about the recent stock-recruit relationship; with catches at such low levels I don't think the indices can tell us much more than the fish are at the lowest levels on record. Without some measure of "effective population size" such as will come from the genetic studies supporting development of the "refuge" population, we don't really have a clue about the

significance of the current low numbers. This is extremely frustrating, but shouldn't deflate the alarm .



# United States Department of the Interior

BUREAU OF RECLAMATION  
Mid-Pacific Regional Office  
2800 Cottage Way  
Sacramento, California 95825-1898

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AUG 22 2008

NOSSAMAN LLP

IN REPLY  
REFER TO:  
MP-3700  
RIM-6.10

AUG 21 2008

VIA FEDERAL EXPRESS

Mr. Paul S. Weiland  
Nossaman, Guthner, Knox & Elliott, LLP  
18101 Von Karman Avenue, Suite 1800  
Irvine, CA 92612-0177

Subject: Freedom of Information Act (FOIA) Request – BOR-2008-00175

Dear Mr. Weiland:

This letter is in response to your May 17, 2008, FOIA request in which you seek two categories of records. We provided a partial response to your request in our July 23, 2008, letter. We have searched the offices of the Bureau of Reclamation's Mid-Pacific Region, and provide this final response regarding the records you seek.

In your item (1), you seek records referenced as "Bennett, unpublished" at various pages of the May 16, 2008, *Central Valley Project and State Water Project Operations Criteria and Plan Biological Assessment*. Our July 23 letter addressed the record referenced on pages 7-2, 7-8 and 7-9. Reclamation does not have records regarding the citations on pages 7-26, 13-5, 13-6, and 17-13. The information is from pre-publication presentations made in numerous public scientific fora by Dr. Bennett. We do not have in our possession any manuscript representing the work.

In your item (2), you seek "all records of communication between Dr. William A. Bennett and any other party dated after January 1, 2007 along with any attachments thereto...." We located one responsive record and provided a copy with our July 23 letter. We have located no additional responsive records.

No responsive records are withheld. If you consider any portions of this response to be a denial of your request under 43 CFR 2.28(a), you may file an appeal by writing to: Department of the Interior, Office of the Solicitor, Attn: FOIA Appeals Office, 1849 C Street NW., Mail Stop 6556, Washington, D.C. 20240.

Your appeal must be in writing and received no later than 30 workdays after the date of this letter or 30 workdays after records have been made available. The appeal should be marked "FREEDOM OF INFORMATION APPEAL" on both the envelope and the face of the letter. Include a copy of correspondence between you and Reclamation, including your original request

EXHIBIT 3


Subject: Freedom of Information Act Request - BOR-2008-00175

2

and this letter. You also should explain in as much detail as possible the reasons you believe our response to be in error. Include a contact name and daytime telephone number, in case the Department needs additional information or clarification of your appeal.

We have not yet compiled the fees to process your request. A billing letter regarding any fees accrued will follow under separate cover. If you have any questions about this response, please contact Ms. Kathleen Christian, Regional FOIA Officer, at 916-978-5554 or via e-mail at [kchristian@mp.usbr.gov](mailto:kchristian@mp.usbr.gov).

Sincerely,

FOR 

Katherine Thompson  
Assistant Regional Director for  
Support Services